

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FELIX CASTRO, *on behalf of himself
and all others similarly situated*,
Plaintiff,

-v-

SOLE SPORTS, INC.,
Defendant.

23-CV-7856 (JPO)

ORDER

J. PAUL OETKEN, District Judge:

On September 5, 2023, Plaintiff Felix Castro, on behalf of himself and all others similarly situated, sued Defendant Sole Sports, Inc. under the Americans with Disabilities Act and state laws. (ECF No. 1.) Although Federal Rule of Civil Procedure 4(m) requires a defendant to be served with the summons and complaint within ninety days after the complaint is filed, Plaintiff has not yet served Defendant. On December 19, 2023, the Court directed Plaintiff to advise the Court in writing about the status of service by January 2, 2024, and it explained that failure to do so would result in the case being dismissed. (ECF No. 5.) To date, Plaintiff has not taken any action responsive to the Court’s order or otherwise taken any affirmative step to prosecute the case.

Federal Rule of Civil Procedure 41(b) authorizes a district court to dismiss an action “if the plaintiff fails to prosecute or to comply with the rules or a court order.” *Baptiste v. Sommers*, 768 F.3d 212, 216 (2d Cir. 2014). It is settled that Rule 41(b) “gives the district court authority to dismiss a plaintiff’s case *sua sponte* for failure to prosecute.” *LeSane v. Hall’s Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001). Dismissal without prejudice is appropriate here. Plaintiff was “given notice that further delay would result in dismissal,” *U.S. ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 (2d Cir. 2004), and there is prejudice where Plaintiff has caused an

“unreasonable delay.” *LeSane*, 239 F.3d at 210. Dismissal without prejudice appropriately strikes a balance “between alleviating court calendar congestion and protecting a party’s right to due process and a fair chance to be heard.” *Id.* at 209.

Accordingly, this action is dismissed without prejudice to refiling.

The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: January 3, 2024
New York, New York



J. PAUL OETKEN
United States District Judge